IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 2907 OF 2007.

Rupali Narindersain Mehta ....Petitioner
V/s
Smt. Tina Narindersain Mehta ....Respondent.

Mr.Zubin Kamdar with Ms.Ferzana Behramkamdin & Ms.Vandana Tiwari i/by M/s.FZB & Associates, Advocates for the petitioner.

Mr.Snehal Shah with Mr.P.A.Kabadi & Ms.Falguni Thakkar i/by M/s.Dojoide & Associates, Advocates for the respondent.

CORAM: A.P.DESHPANDE, J.
17/8/07

PC:

Rule. Rule made returnable forthwith.

Taken up for final hearing by consent of parties.

The present petitioner is daughter of one Narindersain Mehta whereas the respondent is step mother of the petitioner and wife of Narindersain Mehta. The petitioner instituted a suit No.1348/05 in the High Court against the respondent in respect of flat No.62 situated at Trishul Cooperative Housing Society Ltd. (hereinafter referred to as "the suit flat"). The petitioner has contended in the said suit that the flat has been gifted in her favour by her father under a registered gift deed dated 29.7.04 and thus on the basis of the said gift deed she is claiming the possession. Perusal of the plaint and especially para dealing with the cause of action reveals that the foundation of the reliefs claimed by the plaintiff in the suit is execution of gift deed by her father in her favour.

2. The respondent herein viz. step-mother instituted a suit No.2367/05 in the City Civil Court praying for declaration that the gift

deed dated 29.7.04 is illegal, void and nonest. A further prayer is made in the suit pending on the file of the City Civil Court instituted by the respondent that the petitioner should be restrained from acting upon gift deed dated 29.7.04 and thus a prayer for injunction is made. It is an admitted position that the suit filed in the High Court by the petitioner has been filed prior in point of time whereas the suit filed by the respondent is at later point of time. The subject matter of both the suits viz. flat is the same. The parties as well are identical. In this fact situation the present petitioner moved an application in the subsequently instituted suit before the City Civil Court for grant of stay under section 10 of Code of Civil Procedure. The petitioner submitted that the mandate of section 10 applies to the facts of the suit as the matter in issue is directly and substantially in issue in the previously instituted suit and hence prayer for stay was made. The City Civil Court has rejected the said application and aggrieved thereby present writ petition has been filed. Perusal of the impugned order reveals that the only reason for rejecting the application is that the relief claimed in both the suits are not identical. The relief claimed in the suit pending before the High Court filed by the petitioner is for possession whereas the relief claimed in the suit pending in the City Civil Court is for declaration and injunction. Noticing the divergence in the reliefs claimed in the two suits the prayer for stay has been rejected. Thus the basic issue that emerges for adjudication is as to whether identity of the reliefs in the two suits is the requirement of section 10 or otherwise? Before I proceed to address the question it will not be out of place to mention that in the suit instituted by the petitioner and pending before the High Court the claim is based on gift deed as stated herein above. However in the alternative the petitioner claims that a will is also executed in her favour by her father and if and in case the relief claimed on the basis of gift deed is

found to be incapable of being granted then the petitioner is claiming the same relief based on the will purported to have been executed by her father. It is thus clear that in the suit filed by the plaintiff which is earlier suit possession of flat is claimed firstly by placing reliance on the gift deed and alternatively by placing reliance on the will. Whereas the relief claimed in the suit pending before the City Civil Court filed by the respondent is for declaration that the gift deed is illegal and nonest and further relief of injunction is sought seeking to restrain the petitioner from acting on the said gift deed. It is crystal clear that the question of legality and validity or otherwise of the gift deed is the main issue which emerges in both the suits. The petitioner is trying to enforce the gift deed whereas the respondent is trying to attack the gift deed and demolish the same. It is obvious that when the High Court adjudicates the earlier suit filed by the petitioner the High Court is bound to record a finding about the legality and validity of the gift deed and the said finding is bound to operate as *res judicata* in the subsequently instituted suit by the respondent and pending on the file of City Civil Court. It is not necessary that all the issues involved in the earlier suit need to arise in the subsequently instituted suit and vice versa. The main issue in both the suits is pertaining to the legality and validity of the gift deed and this being so, the trial Court ought to have stayed the trial of the suit. The learned counsel for the petitioner has placed reliance on a judgment in the case of ***Jai Hind Iron Mart*** v/s ***Tulsiram Bhagwandas***, AIR 1953 Bom.117. In the said judgment an identical issue arose for consideration of the Court and the Division Bench observed thus:

> "5. Now, what is the position in the case before us. The plaintiffs in the Calcutta suit rely on one version of the contract. The respondents as the plaintiffs in the Bombay suit rely on a different version of the same contract, and the real subject matter

of the suit and the field of controversy between the parties is, what is the contract which was entered into between the parties and what are the terms of that contract. Whatever reliefs the plaintiffs may seek in the Calcutta suit and whatever maybe the reliefs which the respondents may seek in the Bombay suit, these reliefs are incidental to the decision which the Court must come to as to what was the contract between the parties. Therefore, if the Calcutta High Court in the previously instituted suit were to decide that the contract was either as the appellants pleaded or as the respondents pleaded, tht decision must operate as res judicata in the Bombay suit."

If the reliefs in both the suits are examined in the present case what is evident is that the reliefs are incidental to the decision on the main issue i.e. the legality and validity of gift deed. On the basis of legality of gift deed the plaintiff is seeking possession. On the contrary by contending that gift deed is illegal and nonest the respondent is claiming declaration and injunction in her suit. Seen from any angle the reliefs claimed in two suits would not be determinative of the fact as to whether the matter in both the suits is directly and substantially in issue. The division bench to reach the said conclusion has relied upon a judgment in the case of ***Trikamdas Jethabhai*** v/s ***Jivraj Kalianji***, XLIV BLR 699. Learned counsel for the petitioner has placed reliance on Supreme Court jdugment in the case of ***National Instituteof Mental Health & Neuro Sciences*** v/s ***C.Parameshwara***, (2005) 2 SCC 256 which goes to interpret section 10 and hold that the key words "the matter in issue is directly and substantially in issue" the said phraseology is used in contradistinction to "incidentally or collaterally in issue". Thus the requirement for application of section 10 is that the matter must be directly and substantially in issue in both the suits and it should not so

happen that the same is directly and substantially in issue in one suit whereas incidental or collateral in issue in another suit. Same is not the position in the present matter. Issue in regard to legality or validity of the gift deed is directly and substantially in issue in both the suits. Hence the trial of the suit instituted at later point of time has to be stayed. The impugned order passed by the City Civil Court suffers from patent illegality and hence interference with the same is necessary in exercise of writ jurisdiction. At this stage it will not be out of place to mention that learned counsel for the petitioner had suggested clubbing of both the suits and their trial simultaneously in the High Court. It was also so suggested by the City Civil Court but on instructions from the respondent learned counsel for the respondent did not agree to said proposal of simultaneous trial of both the suits by clubbing them by the High Court. The learned counsel expressed his reservation about jurisdiction of the High Court in granting reliefs that are claimed by respondent in suit pending before the City Civil Court. In view of reluctance on the part of respondent to agree to the above referred course of action I am left with no alternate but to stay the trial of the suit instituted by the respondent bearing No.2367/05 till the decision of the Suit No.1348/05 filed by the petitioner in the High Court. Rule made absolute in above terms.

17.8.07